Supreme Court, U.S.
FILED
FEB 28 1994

No. 93-744

In the Supreme Court of the United States

OCTOBER TERM, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GREENWICH COLLIERIES, ET AL.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MAHER TERMINALS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

EDWIN S. KNEEDLER
Deputy Solicitor General

STEVEN J. MANDEL
Deputy Associate Solicitor

EDWARD C. DUMONT
Assistant to the Solicitor General

EDWARD D. SIEGER
Senior Appellate Attorney
Department of Labor
Washington, D.C. 20210

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

In adjudicating claims for benefits under the Longshore and Harbor Workers' Compensation Act and the Black Lung Benefits Act, the Department of Labor applies a "true doubt" rule, under which doubts on factual issues are resolved in favor of a claimant when the evidence is otherwise in equipoise. The question in these cases is whether use of the "true doubt" rule contravenes the Department's own regulations or Section 7(c) of the Administrative Procedure Act.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the captions, Andrew Ondecko was the claimant and a party to the proceedings below in *Greenwich Collieries*, and Pasqualina Santoro was the claimant and a party to the proceedings in *Maher Terminals*. A separate petition for a writ of certiorari filed by Mrs. Santoro, No. 93-474, and a cross-petition filed by Maher Terminals, Inc., No. 93-666, are pending before this Court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory and regulatory provisions involved	2
Statement:	
A. *Greenwich Collieries* v. *Director, OWCP*	3
B. *Maher Terminals, Inc.* v. *Director, OFCP*	8
Summary of argument	14
Argument:	
I. The "true doubt" rule is a reasonable implementation of the Longshore and Harbor Workers' Compensation Act and the Black Lung Benefits Act	18
A. The "true doubt" rule embodies a policy judgment of the sort routinely made by legislatures, agencies and courts in allocating the risk of non-persuasion in various litigation contexts	18
B. Application of the "true doubt" rule is a longstanding and reasonable implementation of the LHWCA and furthers the policies underlying that Act	22
C. Application of the "true doubt" rule is an appropriate implementation of the BLBA, and rests in part on a reasonable interpretation of the Secretary's own regulations under that Act	26
II. The "true doubt" rule does not contravene Section 7(c) of the Administrative Procedure Act	33
A. Section 7(c) imposes only a burden of production, which a claimant must meet before the "true doubt" rule may be applied	34
B. Adjudications under the BLBA and the LHWCA are not, in any event, governed by section 7(c)'s ~~the~~ "burden of proof" provision	42
Conclusion	47
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

Abbott v. *Louisiana Ins. Guar. Ass'n*, 889 F.2d 626 (5th Cir. 1989), cert. denied, 494 U.S. 1082 (1990) 25
Alameda County Training & Employment Bd. v. *Donovan*, 743 F.2d 1267 (9th Cir. 1984) 40
Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) 20
Avondale Indus., Inc. v. *Director, OWCP*, 977 F.2d 186 (5th Cir. 1992) 21
Avondale Shipyards, Inc. v. *Kennel*, 914 F.2d 88 (5th Cir. 1990) 14, 23
Basic Inc. v. *Levinson*, 485 U.S. 224 (1988) 20
Bath Iron Works Corp. v. *White*, 584 F.2d 569 (1st Cir. 1978) 14
Betz v. *Arthur Snowden Co.*, 14 Ben. Rev. Bd. Serv. 805 (1981) 18, 33
Bonessa v. *United States Steel Corp.*, 884 F.2d 726 (3d Cir. 1989) 27
Bowen v. *Yuckert*, 482 U.S. 137 (1987) 21
Bumble Bee Seafoods v. *Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980) 21
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 22
Collins v. *Old Ben Coal Co.*, 861 F.2d 481 (7th Cir. 1988) 32
Concrete Pipe & Prods., Inc. v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264 (1993) .. 19, 20
Darby v. *Cisneros*, 113 S. Ct. 2539 (1993) 38
Davis v. *Director, OWCP*, 936 F.2d 1111 (10th Cir. 1991) 21
Dazzio v. *FDIC*, 970 F.2d 71 (5th Cir. 1992) 40
Del Vecchio v. *Bowers*, 296 U.S. 280 (1935) 10, 36
Director, OWCP v. *Alabama By-Prods. Corp.*, 560 F.2d 710 (5th Cir. 1977) 44
Director, OWCP v. *Bivens*, 757 F.2d 781 (6th Cir. 1985) 44
Director, OWCP v. *Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977) 44

Cases—Continued: Page

Environmental Defense Fund, Inc. v. *EPA*, 548 F.2d 998 (D.C. Cir. 1976), cert. denied, 431 U.S. 925 (1977) 21, 39-40
Environmental Defense Fund, Inc. v. *Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971) 45
F.H. McGraw & Co. v. *Lowe*, 145 F.2d 886 (2d Cir. 1944) 23, 25
Fidelity & Casualty Co. v. *Burris*, 59 F.2d 1042 (D.C. Cir. 1932) 11, 14, 23, 25
Freeman United Coal Mining Co. v. *OWCP*:
988 F.2d 706 (7th Cir. 1993), petition for cert. pending, No. 93-935 ..... 6, 14, 27, 28, 39
999 F.2d 291 (7th Cir. 1993) 29
Friend v. *Britton*, 220 F.2d 820 (D.C. Cir.), cert. denied, 350 U.S. 836 (1955) 23
Garrett v. *Moore-McCormack Co.*, 317 U.S. 239 (1942) 20, 25
General Ship Serv. v. *Director, OWCP*, 938 F.2d 960 (9th Cir. 1991) 21
Greer v. *Director, OWCP*, 940 F.2d 88 (4th Cir. 1991) 27
Grizzle v. *Pickands Mather & Co.*, 994 F.2d 1093 (4th Cir. 1993) 26
Grogan v. *Garner*, 498 U.S. 279 (1991) 36
Harman Mining Co. v. *Director, OWCP*, 826 F.2d 1388 (4th Cir. 1987) 8
Hazardous Waste Treatment Council v. *EPA*, 886 F.2d 355 (D.C. Cir. 1989), cert. denied, 498 U.S. 849 (1990) 31, 40
Jones v. *Director, OWCP*, 977 F.2d 1106 (7th Cir. 1992) 23
Keyes v. *School Dist. No. 1*, 413 U.S. 189 (1973) 19, 22, 42
Kowalchick v. *Director, OWCP*, 893 F.2d 615 (3d Cir. 1990) 27
Lavine v. *Milne*, 424 U.S. 577 (1976) 19
Lesicko v. *Peabody Coal Co.*, 1 Black Lung Rep. (MB) 1-87 (Ben. Rev. Bd.), aff'd on reconsideration, 1 Black Lung Rep. 1-276 (Ben. Rev. Bd. 1977), rev'd on other grounds, 581 F.2d 121 (7th Cir. 1978) 27

Cases—Continued: Page

Lessar v. *C.F. & I. Steel Corp.*, 3 Black Lung Rep. (MB) 1-63 (Ben. Rev. Bd.) 3
Lorillard v. *Pons*, 434 U.S. 575 (1978) 25
Maine v. *United States Dep't of Labor*, 669 F.2d (1st Cir. 1982) 40
Medina v. *California*, 112 S. Ct. 2572 (1992) 19, 33
Merritt v. *United States*, 960 F.2d 15 (2d Cir. 1992) 40
Mount Healthy City Bd. of Educ. v. *Doyle*, 429 U.S. 274 (1977) 20
Mullins Coal Co. v. *Director, OWCP*, 484 U.S. 135 (1987) 3, 4, 30, 31, 32
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) .. 25
NLRB v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) 22
NLRB v. *Mastro Plastics Corp.*, 354 F.2d 170 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966) 45, 47
NLRB v. *Transportation Management Corp.*, 462 U.S. 393 (1983) 7, 12, 16, 20, 22, 31, 35, 40, 41, 42
Noble Drilling Co. v. *Drake*, 795 F.2d 478 (5th Cir. 1986) 23
Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 (1977) 25
Old Ben Coal Corp. v. *Interior Bd. of Mine Operations Appeals*, 523 F.2d 25 (7th Cir. 1975) 21, 40
Panhandle Producers & Royalty Owners Ass'n v. *Economic Regulatory Admin.*, 822 F.2d 1105 (D.C. Cir. 1987) 45
Parsons Corp. v. *Director, OWCP*, 619 F.2d 38 (9th Cir. 1980) 14, 23
Patton v. *Director, OWCP*, 763 F.2d 553 (3d Cir. 1985) 44
Pauley v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524 (1991) 28
Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988) 28
Potomac Elec. Power Co. v. *Director, OWCP*, 449 U.S. 268 (1980) 26
Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989) 20

Cases—Continued: Page

Provance v. *United States Steel Corp.*, 1 Black Lung Rep. 1-483 (Ben. Rev. Bd. 1978) 19, 27
Rivers v. *Schweiker*, 684 F.2d 1144 (5th Cir. 1982) 21
Skukan v. *Consolidation Coal Co.*, 993 F.2d 1228 (6th Cir. 1993), petition for cert. pending, No. 93-964 ..... 27, 30, 31, 40
Southern Pac. Co. v. *Sheppeard*, 112 F.2d 147 (5th Cir. 1940) 23
Southern S.S. Co. v. *Norton*, 101 F.2d 825 (3d Cir. 1939) 23
Stearns Elec. Paste Co. v. *EPA*, 461 F.2d 293 (7th Cir. 1972) 45
Steadman v. *SEC*, 450 U.S. 91 (1981) 12, 17, 22, 35, 47
Stinson v. *United States*, 113 S. Ct. 1913 (1993) .. 30, 31-32
Summers v. *Tice*, 199 P.2d 1 (Cal. 1948) 20
Teamsters v. *United States*, 431 U.S. 324 (1977) .. 20
U.S. Indus./Federal Sheet Metal Inc. v. *Director, OWCP*, 455 U.S. 608 (1982) 11, 35-36
U.S. Pipe & Foundry Co. v. *Webb*, 595 F.2d 264 (5th Cir. 1979) 44
Voris v. *Eikel*, 346 U.S. 328 (1953) 25
Ward's Cove Packing Co. v. *Atonio*, 490 U.S. 642 (1989) 31
West v. *Director, OWCP*, 896 F.2d 308 (8th Cir. 1990) 44
Woodward v. *Director, OWCP*, 991 F.2d 314 (6th Cir. 1993) 33
Young & Co. v. *Shea*, 397 F.2d 185, on petition for reh'g, 404 F.2d 1059 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969) 23

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 551:
5 U.S.C. 551-559 45
5 U.S.C. 554 *et seq.* 44, 2a
5 U.S.C. 554 ..... 43, 47
5 U.S.C. 554(c)(2) 43, 46
5 U.S.C. 556 43
5 U.S.C. 556(d) (§ 7(c)) ..... *passim*, 1a

Statutes and regulations—Continued: Page

5 U.S.C. 557 43
5 U.S.C. 559 45
Black Lung Benefits Act of 1972, 30 U.S.C. 901 *et seq.* 3, 1a
§ 402(b), 30 U.S.C. 902(b) 4
§ 402(f), 30 U.S.C. 902(f) 27
§ 402(f)(1)(A), 30 U.S.C. 902(f)(1)(A) 5
§ 411(c)(1), 30 U.S.C. 921(c)(1) 4
§ 411(c)(2), 30 U.S.C. 921(c)(2) 30
§ 411(c)(4), 30 U.S.C. 921(c)(4) 30
§ 411(c)(5), 30 U.S.C. 921(c)(5) 30
§ 422(a), 30 U.S.C. 932(a) 2, 6, 27, 43, 44, 3a
§ 422(g), 30 U.S.C. 932(g) 8
§ 424(b), 30 U.S.C. 934(b) 8
§ 507, 30 U.S.C. 956 43
§ 508, 30 U.S.C. 957 27
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 3
§ 7(c)(2), 33 U.S.C. 907(c)(2) 26
§ 7(d)(4), 33 U.S.C. 907(d)(4) 26
§§ 19-21, 33 U.S.C. 919-921 27
§ 19(c), 33 U.S.C. 919(c) 47
§ 19(d), 33 U.S.C. 919(d) 2, 24, 43, 44, 47, 2a
§ 20(a), 33 U.S.C. 920(a) 9, 10, 11, 35
§ 20(d), 33 U.S.C. 920(d) 10, 11
§ 21(b), 33 U.S.C. 921(b) 24
§ 21(c), 33 U.S.C. 921(c) 6
§ 23(a), 33 U.S.C. 923(a) 2, 23, 24, 27, 43, 46, 2a
Longshoremen's & Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 14, 86 Stat. 1261 ..... 24, 47
§ 15, 86 Stat. 1261 24
§ 15(e), 86 Stat. 1262 24
26 U.S.C. 9501(d)(1)(A) 8
29 U.S.C. 160(c) 42
38 U.S.C. 5107 21
20 C.F.R.:
Pt. 702:
Section 702.410(c) 26

Regulations—Continued: Page

Pt. 718:
Section 718.1(a) 29
Section 718.2 6
Section 718.3(c) 2, 29, 30, 31, 44, 1a
Sections 718.201-718.206 30
Section 718.203(a) 4
Section 718.203(b) 4
Section 718.204(b) 5
Sections 718.204(c)(1)-(4) 5
Section 718.402 33
Section 718.403 ..... 2, 3, 7, 30, 31, 2a
Section 718.409(a)(1) 32
Pt. 725:
Section 725.2 6
Section 725.4(a) 6, 44
Section 725.409(a)(1) 33
Section 725.410 4
Section 725.414(a) 33
Section 725.481 5
Section 725.421 *et seq.* 4
Section 725.452(a) 2, 44, 3a
Section 725.522(b) 8
Section 725.535(b) 8
Section 725.602 8
Section 725.603 8
Section 725.608 8
Pt. 727:
Section 727.202 6
Section 727.203 6
Section 727.203(a) 31
21 C.F.R. 12.87(d) 21
38 C.F.R. 3.102 21

Miscellaneous:

Attorney General's Manual on the Administrative Procedure Act (1947) 38, 46
Black's Law Dictionary (6th ed. 1990) 31
Coal Mine (BLBA) Procedure Manual (Feb. 1980) 27
3 K. Davis, *Administrative Law Treatise* (2d ed. 1978) 40

Miscellaneous—Continued: Page

115 Cong. Rec. 39,996 (1969) 45
118 Cong. Rec. 36,385 (1972) 47
127 Cong. Rec. 9831 (1981) 48
Employment Standards Admin., U.S. Dep't of Labor, *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* (1983) 32
Employment Standards Admin., U.S. Dep't of Labor, *Black Lung Benefits Act, Annual Report on Administration of the Act During Calendar 1991* (1992) 33
43 Fed. Reg. 36,826 (1978) 27
H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946) 38, 39, 42
H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972) 47
4 J. Stein, *et al., Administrative Law* (1993) 40, 41
9 J. Wigmore, *Evidence* (3d ed. 1940) 19, 31, 36
Longshoremen's and Labor Workers' Compensation Act Amendments of 1981: Hearings on S. 1182 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 97th Cong., 1st Sess. (1981) 48
McCormick on Evidence (E. Cleary ed., 3d ed. 1984) 20, 36
N. Snyder & M. Solomons, *Black Lung—A Study in Occupational Disease Compensation* (1976), *reprinted in Black Lung Benefits Reform Act, 1976: Hearings on H.R. 10760 and S. 3133 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. (1976) 28
S. Rep. No. 752, 79th Cong., 1st Sess. (1945) 38, 39, 42
S. Rep. No. 743, 92d Cong., 2d Sess. (1972) 28
S. Rep. No. 1125, 92d Cong., 2d Sess. (1972) 24, 25, 47
S. Rep. No. 209, 95th Cong., 1st Sess. (1977) 28

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-744

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GREENWICH COLLIERIES, ET AL.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MAHER TERMINALS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals in *Greenwich Collieries* v. *Director, Office of Workers' Compensation Programs* (Pet. App. 1a-16a) is reported at 990 F.2d 730. The decision of the Benefits Review Board

in that case (Pet. App. 17a-23a) is unreported, as is the decision of the administrative law judge (Pet. App. 24a-46a).

The opinion of the court of appeals in *Maher Terminals, Inc.* v. *Director, Office of Workers' Compensation Programs* (J.A. 8-24) is reported at 992 F.2d 1277. The decision of the Benefits Review Board in that case (J.A. 25-33) is unreported, as are the decisions of the administrative law judge (J.A. 34-56).

JURISDICTION

The court of appeals entered its judgment in *Greenwich Collieries* on March 23, 1993, and in *Maher Terminals* on April 19, 1993. The court denied petitions for rehearing in both cases on June 25, 1993. Pet. App. 47a-50a. On September 15, 1993, and October 18, 1993, Justice Souter extended the time for filing a petition for a writ of certiorari in both cases, first to October 25, 1993, and then to November 10, 1993. The petition in both cases was filed on November 10, 1993, and granted on January 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d); Sections 19(d) and 23(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 919(d) and 923(a); Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. 932(a); and relevant provisions of the Department of Labor's regulations implementing the Black Lung Benefits Act (20 C.F.R. 718.3(c), 718.403, and 725.452(a)) are reprinted in pertinent part at App., *infra*, 1a-4a.

STATEMENT

These cases concern the validity of the "true doubt" rule, a principle of adjudication that the Department of Labor has for many years applied in resolving benefits claims under the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.*, and the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* The rule provides that when evidence submitted by the claimant and by the party opposing an award of benefits is of equal weight, the remaining doubt is resolved in favor of the claimant. In *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135 (1987), this Court specifically noted, without any expression of disapproval, that "[t]he Benefits Review Board (BRB) 'has consistently upheld the principle that, where true doubt exists, that doubt shall be resolved in favor of the claimant.'" *Id.* at 144 n.12 (quoting *Lessar* v. *C.F. & I. Steel Corp.*, 3 Black Lung Rep. (MB) 1-63, 1-68 (Ben. Rev. Bd. 1981)); see also 484 U.S. at 156-157 n.29; Pet. App. 4a, 19a & n.3. Nonetheless, in the cases before the Court, the court of appeals held that application of the "true doubt" rule is inconsistent with this Court's decision in *Mullins Coal*, as well as with one of the Department's own regulations implementing the BLBA (20 C.F.R. 718.403) and with Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d).

A. *Greenwich Collieries* v. *Director, OWCP*

1. Andrew Ondecko, the claimant in *Greenwich Collieries*, worked as a coal miner for 31 years before applying for disability benefits under the BLBA. Pet. App. 3a. The Department's Office of Workers' Compensation Programs (OWCP) initially denied benefits, and Ondecko requested a hearing before an ad-

ministrative law judge (ALJ). See 20 C.F.R. 725.410, 725.421 *et seq.* The ALJ determined that Ondecko had pneumoconiosis and was totally disabled by that disease, and she awarded benefits.[1] Pet. App. 41a, 44a.

In finding the existence of pneumoconiosis, the ALJ considered 33 x-ray interpretations by five highly qualified experts.[2] Pet. App. 40a-41a. One of those experts read five x-rays as positive for the disease; the others read the same and different films as negative. *Ibid.* The ALJ concluded, however, that "the fact that at least one [expert] repeatedly found evidence of pneumoconiosis [was] significant enough to raise true doubt on the issue of pneumoconiosis notwithstanding the number of negative interpretations." *Id.* at 41a. Because "[t]rue doubt is to be resolved in favor of the Claimant," the ALJ found that Ondecko had established the existence of the disease. *Ibid.*

In finding that the claimant was totally disabled by pneumoconiosis, the ALJ considered eight medical

[1] The ALJ also found that the disease arose out of coal mine employment. See 30 U.S.C. 902(b) (definition of pneumoconiosis); 20 C.F.R. 718.203(a). That finding was based on an unrebutted statutory presumption of causation available to any miner who has had at least ten years of coal mine employment, and it was not challenged before the Benefits Review Board or the court of appeals. Pet. App. 41a-42a; see 30 U.S.C. 921(c)(1); 20 C.F.R. 718.203(b).

[2] Although there were 44 x-ray interpretations in the record, the ALJ considered the 33 provided by those physicians with the best objective qualifications—*i.e.*, those who were both Board-certified in radiology and specially certified as having demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis ("B-readers"). Pet. App. 40a; see *id.* at 20a n.4; *Mullins Coal*, 484 U.S. at 145 n.16.

opinions, four of them supporting a finding of disability and four supporting a finding that the claimant was not disabled.[3] Pet. App. 43a. The ALJ recognized the qualifications of the four physicians who found no disability, but gave special consideration to the contrary opinion of the physician who had treated Ondecko for more than 20 years. *Id.* at 43a-44a. The ALJ concluded that "the fact that the Claimant's treating physician consider[ed] him totally disabled * * * raise[d] true doubt in face of the Employer's experts[']opinions," and she again resolved that doubt in favor of the claimant. *Id.* at 44a.

2. Greenwich Collieries appealed to the Department's Benefits Review Board, see 20 C.F.R. 725.481, which affirmed the ALJ's determination. Pet. App. 17a-23a. The Board noted that negative x-ray interpretations are "not a trustworthy indicator of the absence of pneumoconiosis," and it agreed that the ALJ was not required to accept the negative interpretations solely because there were more of them. *Id.* at 19a. The Board then concluded that the ALJ had "properly discussed and weighed all relevant medical evidence" on the pneumoconiosis issue, and that because she "found the positive and negative interpretations by [expert] physicians * * * to be equally probative," she had properly resolved the question in

[3] A black lung claimant may establish total disability using pulmonary function tests, blood gas tests, proof of a characteristic heart condition, or the opinion of a physician exercising "reasoned medical judgment." 20 C.F.R. 718.204(c)(1)-(4). Ondecko relied only on medical opinions. Pet. App. 42a-44a. Under the BLBA, "total disability" means inability of a miner to do his usual coal mine work or work comparable to it. 30 U.S.C. 902(f)(1)(A); 20 C.F.R. 718.204(b). Ondecko's usual coal mine work involved dragging pipes that weighed up to 150-200 pounds. Pet. App. 42a n.10.

Ondecko's favor under the "true doubt" rule. *Id.* at 19a-20a & n.3.

On the question of disability, the Board noted that the ALJ had "stated her basis for finding the evidence [on each side] equally probative," and it concluded that "her discussion of the medical evidence * * * supports the inference" that she properly considered all of the conflicting evidence. The Board declined to "reweigh the evidence or substitute its inferences" for those of the ALJ. Pet. App. 22a.

3. On judicial review pursuant to 33 U.S.C. 921(c) (as incorporated from the LHWCA into the BLBA by 30 U.S.C. 932(a)), the court of appeals vacated and remanded. Pet. App. 1a-16a. First, the court read this Court's decision in *Mullins Coal* to require that a claimant prove the existence of pneumoconiosis by a preponderance of the evidence. *Id.* at 5a-6a.[4] Because the "true doubt" rule allows a claimant to prevail when the evidence is in equipoise, the court of appeals held that application of the rule is inconsistent with *Mullins Coal.* It explicitly disagreed in this regard with the decision in *Freeman United Coal Mining Co.* v. *OWCP*, 988 F.2d 706, 711-712 (7th Cir. 1993) (per curiam), petition for cert. pending, No. 93-935, which construed *Mullins Coal* to support use of the "true doubt" rule to prove pneumoconiosis. Pet. App. 6a & n.3.

[4] *Mullins Coal* construed the Department of Labor's "interim presumption" regulation, 20 C.F.R. 727.203, which applied to claims that were filed before the Department's permanent regulations became effective. See 20 C.F.R. 727.200. The permanent regulations apply to all claims, including the one at issue in *Greenwich Collieries*, filed after March 31, 1980. See 20 C.F.R. 718.2. The procedural regulations set forth in 20 C.F.R. Pt. 725 apply to all black lung claims filed with the Department of Labor. See 20 C.F.R. 725.2, 725.4(a).

Second, the court held that 20 C.F.R. 718.403, which provides generally that "[t]he burden of proving a fact alleged in connection with [a BLBA claim] shall rest with the party making such allegations," imposes on the claimant the burden of persuasion with respect to the matters in issue. Pet. App. 8a-11a. The court acknowledged (*id.* at 8a-9a) this Court's conclusion in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 404 n.7 (1983), that similar language in Section 7(c) of the APA, 5 U.S.C. 556(d), imposes only a burden of production, rather than persuasion. But it found the difference between the terms "burden of proving" (in Section 718.403) and "burden of proof" (in Section 7(c)) sufficient to distinguish this case from *Transportation Management* and to require that the former be construed to mean "burden of persuasion." Pet. App. 9a-11a.

As a result of its construction of 20 C.F.R. 718.403, the court found it unnecessary to address whether Section 7(c) of the APA independently requires the Secretary or the BRB to allocate the burden of persuasion to the claimant. Pet. App. 11a & n.4. The court did conclude, however, that Section 7(c) requires whichever party bears the burden of persuasion to establish each relevant point by a preponderance of the evidence. Pet. App. 12a-13a. Because the "true doubt" rule allows the claimant to prevail when the evidence is in equipoise, the court concluded that use of the rule violates Section 7(c) of the APA.[5]

[5] The court noted that statutory provisions enacted subsequent to the APA may be held to supersede or modify the relevant provisions of that statute if they do so expressly, but it concluded that the BLBA does not have that effect. Pet. App. 13a n.5, 15a.

Pet. App. 13a-15a. The court thought it unclear, however, whether in the absence of the "true doubt" rule the ALJ would have found Ondecko's evidence sufficient to meet his burden of persuasion under the preponderance of the evidence standard, and it therefore remanded the case to allow the ALJ to make that determination. *Id.* at 15a-16a.[6]

B. *Maher Terminals, Inc.* v. *Director, OWCP*

1. Michael Santoro sustained a work-related back and neck injury on July 23, 1985, while employed by respondent Maher Terminals, Inc. J.A. 10. After having been treated and released to return to work, Santoro experienced increasing pain and numbness; by August 15, he was unable to get out of bed. *Ibid.* An examining physician at the hospital reported spinal cord swelling and irregularity, and a neurosurgeon, after reviewing test results and doing a follow-up examination, suspected a tumor in the spinal cord. J.A. 10-11, 27. Surgery in fact disclosed such a tumor, which was identified as an astrocytoma, a

[6] We have been informed that on November 17, 1993, the Pennsylvania Department of Labor and Industry's Bureau of Workers' Compensation found Ondecko partially disabled due to pneumoconiosis and awarded him benefits for the period beginning October 1, 1993. The state award will largely (although not entirely) offset any federal black lung benefits that would otherwise be payable to Ondecko after that date, but it will not affect federal benefits for prior periods. See 30 U.S.C. 932(g); 20 C.F.R. 725.535(b); *Harman Mining Co.* v. *Director, OWCP*, 826 F.2d 1388 (4th Cir. 1987). The Director has paid those benefits to Ondecko since the ALJ's award, see 26 U.S.C. 9501(d)(1)(A); 20 C.F.R. 725.522(b), and therefore retains a direct monetary interest in having the award affirmed so that he may recoup the payments made, plus interest, from respondent Greenwich Collieries. See 30 U.S.C. 934(b); 20 C.F.R. 725.602, 725.603, 725.608.

rare form of nerve cancer. J.A. 11, 27. Santoro became paraplegic and mute, and he died in March 1986 from cardiac arrest caused by the astrocytoma. *Ibid.*

Santoro's widow, the claimant in *Maher Terminals* and petitioner in No. 93-474, filed a claim under the LHWCA, alleging that the July 1985 injury had rendered her husband totally disabled and caused his death. J.A. 40, 46-47. She relied primarily on reports and testimony by the neurosurgeon concluding that trauma from the injury had produced swelling, which significantly hastened Santoro's disability and death by aggravating a tumor that was previously dormant and might have remained so for many years. J.A. 42, 47-48. The company's expert, a neurologist and pathologist who reviewed relevant records but never actually examined Santoro, testified that it was "medically impossible" that Santoro had suffered a severely traumatic neck injury in his accident at work. He was of the view that the tumor had erupted spontaneously, destroying the spinal cord "without reference to any external event." J.A. 42-43, 49-50.

The ALJ found that Santoro's widow had established both the existence of his injury and circumstances at his work that could have caused the injury. J.A. 41. Under Section 20(a) of the LHWCA, 33 U.S.C. 920(a),[7] that showing raised a presumption of coverage and shifted to the employer the burden of producing "substantial evidence to the contrary"

[7] Section 20(a) of the LHWCA provides that "[i]n any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed, in the absence of substantial evidence to the contrary—(a) That the claim comes within the provisions of this chapter." 33 U.S.C. 920(a).

—*i.e.*, "evidence specific and comprehensive enough to sever the potential connection between the resultant impairment and work environment." J.A. 41. The ALJ then concluded that the testimony of the employer's expert was sufficient to rebut the statutory presumption, and proceeded to consider the case "on the basis of the record as a whole." J.A. 43.

After thoroughly reviewing the evidence, J.A. 43-55, the ALJ credited the opinion of the claimant's expert because it was "anchored in his experience as a hands-on neurosurgeon," but noted that some parts of his testimony appeared "inconsistent or contradictory" (J.A. 48-51, 54-55); similarly, he found the employer's expert highly qualified and persuasive (J.A. 42, 51), but rejected his conclusion that Santoro had suffered no neck injury (J.A. 50-51) and questioned his opinion regarding the presence and possible effect of post-traumatic swelling (J.A. 54). On balance, the ALJ found the evidence of causation conflicting and equally probative; deeming the issue "arguable" and "debatable" even after careful weighing of the evidence, the ALJ invoked the "true doubt" rule and awarded benefits to the claimant. J.A. 50-55; see also *id.* at 34 (order denying rehearing).

2. The Benefits Review Board affirmed. J.A. 25-33. Respondent Maher Terminals argued before the Board that application of the "true doubt" rule in effect resurrected the presumption of causation initially provided by Section 20(a) of the LHWCA, 33 U.S.C. 920(a), whereas this Court held in *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935), that a similar presumption "falls out of the case" after it is successfully rebutted by the employer. See J.A. 29.[8]

[8] *Del Vecchio* construed the presumption in Section 20(d) of the LHWCA "[t]hat the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another." 33 U.S.C. 920(d). This Court has assumed that the Section 20(a) presumption "is of the same nature." *U.S. Indus./Federal Sheet Metal Inc.* v. *Director, OWCP*, 455 U.S. 608, 612 n.5 (1982).

The Board rejected that argument, holding that the "true doubt" rule is consistent with *Del Vecchio* because it comes into play only after the ALJ has weighed all of the evidence (without regard to the rebutted statutory presumption) and found it evenly balanced. *Ibid.* The Board noted that the "true doubt" rule is "well established" under the LHWCA, and declined to depart from it in this case. *Ibid.* After reviewing the evidence and the ALJ's opinion, J.A. 30-32, the Board found no error in the ALJ's analysis or his application of the "true doubt" rule, and it therefore affirmed the award of benefits. *Id.* at 32.

3. The same panel of the Third Circuit that decided *Greenwich Collieries* also vacated the Board's decision in *Maher Terminals*. J.A. 8-24. The court agreed with the Board that the ALJ had not relied improperly on the statutory presumption in Section 20(a). J.A. 13. The court also recognized that other courts had applied the "true doubt" rule under the LHWCA. J.A. 11-12, 22-23. It found the genesis of the rule in the decision 60 years earlier in *Fidelity & Casualty Co.* v. *Burris*, 59 F.2d 1042, 1044 (D.C. Cir. 1932), which grounded the rule in the LHWCA's compensatory purposes. J.A. 12. The court below nonetheless dismissed the *Burris* rationale as having "no logical basis in the law." *Ibid.* The court further held in this case (unlike in *Greenwich Collieries*) that Section 7(c) of the APA not only specifies the standard of proof (preponderance of the evidence) that

must be met by whichever party bears the burden of persuasion on a particular issue, but also affirmatively allocates the burden of persuasion to the party seeking benefits under the LHWCA. J.A. 17-18. Because the "true doubt" rule allows a claimant to prevail when the evidence is in equipoise, the court concluded that its application violates the APA. J.A. 22, 24.

The court of appeals acknowledged (J.A. 15) this Court's conclusion in *Transportation Management*, 462 U.S. at 404 n.7, that Section 7(c) of the APA "determines only the burden of going forward, not the burden of persuasion." But the court treated that conclusion as "dicta" (J.A. 15), apparently because the specific factual context in which the burden-shifting issue arose in *Transportation Management* involved an affirmative defense, rather than the underlying unfair labor practice charge. The court distinguished the affirmative defense situation as a "logical exception" to what it considered to be a general rule under the APA that a claimant must bear the burden of persuasion "on the subject of the litigation." J.A. 21-22.

Similarly, the court of appeals concluded that despite *Transportation Management*'s unqualified language concerning the effect of Section 7(c), this Court had interpreted only the first sentence of that section, which provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." J.A. 14 (quoting 5 U.S.C. 556(d)). The court pointed out that in the earlier case of *Steadman* v. *SEC*, 450 U.S. 91, 98, 102 (1981), this Court had construed the third sentence of Section 7(c) to provide that administrative determinations governed by the APA be made in accordance with a "preponderance of the evidence"

standard.[9] J.A. 15-16. Although it recognized that "*Steadman*, standing alone, does not allocate the burden of persuasion, but rather defines its scope as a preponderance of the evidence," the court reasoned that Section 7(c) prohibits issuance of an order except on a preponderance of the evidence. J.A. 17. Because it viewed a benefits claimant as the party who "seeks to change the status quo," J.A. 18, the court concluded that Section 7(c) prohibits any change in the status quo based on the "true doubt" rule, because in that situation the claimant, by definition, has not supported her position by a preponderance of the evidence. J.A. 22. In doing so, the court "concede[d]" that the legislative history of Section 7(c), "taken together with *Steadman*, suggests that the party who seeks a denial of relief is *also* required by section 7(c) to sustain such denial by a preponderance of the evidence." J.A. 19. The court declined, however, to draw from that proposition the conclusion that Section 7(c) of the APA does not itself allocate the burden of persuasion when the evidence supporting an award of benefits and the evidence supporting a denial are in equipoise. Instead, the court concluded that the burden of persuasion must be on the party initiating the proceeding on all issues raised by that party. J.A. 19.

The court of appeals explicitly rejected decisions of the First, Fifth, Ninth and District of Columbia Circuits upholding the "true doubt" rule under the LHWCA, remarking only that those courts had "not

---

[9] The third sentence of Section 7(c) provides that "[a] sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. 556(d).

seriously considered the applicability of the APA to the question at hand." J.A. 22-23 (citing *Avondale Shipyards, Inc.* v. *Kennel*, 914 F.2d 88 (5th Cir. 1990) (per curiam); *Parsons Corp.* v. *Director, OWCP*, 619 F.2d 38 (9th Cir. 1980); *Bath Iron Works Corp.* v. *White*, 584 F.2d 569 (1st Cir. 1978); *Fidelity & Casualty Co.* v. *Burris*, 59 F.2d 1042 (D.C. Cir. 1932)). The court recognized that the opinion in *Freeman United Coal Mining Co.* v. *OWCP*, 988 F.2d 706 (7th Cir. 1993) (per curiam), petition for cert. pending, No. 93-935, did consider the effect of the APA, and upheld application of the "true doubt" rule under the BLBA. But the court declined to follow *Freeman*, believing it to be inconsistent with this Court's decision in *Mullins Coal* and with the panel's own previous decision in *Greenwich Collieries*.

As in *Greenwich Collieries*, the court thought it unclear whether, in the absence of the "true doubt" rule, the ALJ would have found Mrs. Santoro's evidence sufficient to satisfy her burden of persuasion. It therefore vacated the decision of the Benefits Review Board with directions to remand the case to the ALJ to make that determination. J.A. 24.

SUMMARY OF ARGUMENT

1. The true doubt rule is a principle of adjudication that allocates the risk of non-persuasion in litigating claims under the LHWCA and the BLBA. Such principles are routinely prescribed by legislatures or adopted by courts for particular situations based on experience, policy, and relevant evidentiary probabilities. Similarly, administrative agencies are free, within the limits set by statute, to allocate the burden of persuasion on particular questions that arise in agency proceedings, and agencies have done

so in a variety of contexts. Here, the Secretary of Labor has determined that once an LHWCA or BLBA claimant has carried the burden of producing competent evidence that is sufficient (if unrebutted) to justify an award of benefits, the party opposing the award should bear not only the burden of producing contrary evidence, but also the ultimate risk that its rebuttal will not persuade the trier of fact, by a preponderance of the evidence, that the claimant is not entitled to an award. That determination by the Secretary is entitled to deference from this Court unless it is unreasonable or inconsistent with some statutory command. It is neither, and it should therefore be upheld.

a. The LHWCA affords considerable flexibility in establishing procedures for adjudicating claims under that Act. The Act itself does not specify which party should bear the ultimate risk of non-persuasion on eligibility for benefits, and for fifty years or more administrators and federal courts reviewing LHWCA claims have applied some variation of the principle now embodied in the "true doubt" rule. Congress amended pertinent provisions of the LHWCA in 1972, without restricting the procedural and evidentiary flexibility afforded adjudicators under the Act or expressing any dissatisfaction with principles such as the "true doubt" rule that had by then become established features of administrative and judicial practice under the Act. Moreover, the assignment of the risk of non-persuasion to employers is reasonable as a matter of policy under the LHWCA, which is a remedial statute intended to provide a vulnerable class of injured employees with a reliable source of compensation, while providing employers not only ample opportunity to contest invalid claims, but general protection from the far larger claims

otherwise available to injured employees under the common law.

b. Many of the same considerations support application of the "true doubt" rule in adjudicating claims under the BLBA. The BLBA contains broad grants of regulatory and procedural authority, and no provision restricting the administrative allocation of the burden of persuasion. Also as in the case of the LHWCA, use of the "true doubt" rule is consistent with congressional intent, and constitutes a reasonable implementation of the remedial and protective purposes of the Act. Moreover, the Secretary's current regulations implementing the BLBA embody the same balance that is reflected in the "true doubt" rule between requiring claimants to adduce sufficient evidence of eligibility, and giving them the benefit of the doubt in those few cases in which conscientious evaluation leaves the adjudicator unable to conclude that either side has produced a preponderance of the evidence on a particular point. At least in cases to which those regulations apply, application of the "true doubt" rule is grounded not only in a permissible construction of the underlying statute, but in the Secretary's interpretation of his own regulations.

2. a. Contrary to the court of appeals' holding, application of the "true doubt" rule does not conflict with Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d). The first sentence of Section 7(c), as interpreted by this Court in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 404 n.7 (1983), requires only that the party advocating a particular result bear the burden of *production* with respect to that issue. The third sentence of Section 7(c) likewise does not allocate the burden of persuasion to one party or the other. As interpreted by this Court in *Steadman* v. *SEC*, 450 U.S. 91 (1981), the third sentence requires only that whichever party bears the burden of persuasion on an issue must generally establish its position by a preponderance of the evidence. Read separately and together, the APA, *Steadman*, and *Transportation Management* all permit use of the "true doubt" rule, under which a claimant must bear the burden of producing evidence sufficient (if unrebutted) to support his claim, but the party opposing the claim bears the ultimate burden of persuasion.

The court of appeals acknowledged that the APA and this Court's cases could be harmonized in the manner that we propose, but nevertheless construed Section 7(c) to impose the burden of persuasion on benefits claimants. That construction is unsound. The text of Section 7(c) is silent regarding allocation of the burden of persuasion. Its structure, the history of the APA, and the case law all make clear, however, that Section 7(c) imposes only a burden of production on proponents of agency action. Moreover, the court of appeals' rigid construction, which *requires* agencies to allocate the risk of non-persuasion in the same manner regardless of the statutory context or other circumstances, itself contravenes the flexible policy of the APA, which was not intended to impose undue restrictions on government operations.

b. In any event, whatever restrictions Section 7(c) imposes do not apply to claims adjudications under the LHWCA and the BLBA. The APA applies to BLBA adjudications only by incorporation from the LHWCA, and that incorporation does not apply where the Secretary's regulations provide otherwise. As noted above, the Secretary's current regulations under the BLBA embody the principle

of the "true doubt" rule, and therefore exclude application of any contrary general principle otherwise applicable under the APA. In the case of the LHWCA, the Act's broad grant of power to adjudicate claims without regard to otherwise applicable rules of evidence and procedure authorizes LHWCA adjudicators to apply the "true doubt" rule. Congress expressly provided for LHWCA adjudications to be covered by the APA in 1972, but there is no indication that it intended thereby to revise settled evidentiary rules long applied in resolving LHWCA claims.

ARGUMENT

I. THE "TRUE DOUBT" RULE IS A REASONABLE IMPLEMENTATION OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT AND THE BLACK LUNG BENEFITS ACT

A. The "True Doubt" Rule Embodies A Policy Judgment Of The Sort Routinely Made By Legislatures, Agencies And Courts In Allocating The Risk Of Non-Persuasion In Various Litigation Contexts

The "true doubt" rule is a principle of adjudication that allocates the risk of non-persuasion in litigating claims under the LHWCA and the BLBA. It does not relieve a claimant of the burden of producing sufficient evidence to justify an award of benefits, and it does not require that a claimant prevail merely because the evidence on a point is in conflict. Nor does it relieve the adjudicator of the obligation to weigh the claimant's evidence against other evidence in the record. See *Betz* v. *Arthur Snowden Co.*, 14 Ben. Rev. Bd. Serv. (MB) 805, 808 (1981). The rule provides only that when an adjudicator finds the evidence on both sides of a point

evenly balanced (taking account of both its quantity and its quality), so that neither party can fairly be said to have adduced a preponderance of the evidence, the uncertainty should be resolved in favor of the claimant. See, *e.g.*, Pet. App. 19a n.3; *Provance* v. *United States Steel Corp.*, 1 Black Lung Rep. (MB) 1-483, 1-486 (Ben. Rev. Bd. 1978). This Court has recognized in other contexts that allocation of the risk of non-persuasion "is merely a question of policy and fairness based on experience in * * * different situations." *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 209 (1973) (quoting 9 J. Wigmore, *Evidence* § 2486, at 275 (3d ed. 1940)). The administrative answer to that question in these cases—adopted through the "true doubt" rule by those charged with implementing these two complex statutory benefits schemes—is entitled to substantial deference from the courts.

There is nothing pre-ordained about the allocation of the burden of persuasion in any particular civil context. See, *e.g.*, *Keyes*, 413 U.S. at 209-210. A legislature, in fashioning a particular program, may (within broad constitutional limits) impose whatever structure of proof it chooses for resolution of civil disputes arising under the statutory scheme.[10] See *Lavine* v. *Milne*, 424 U.S. 577, 585 (1976); see also *Concrete Pipe & Prods., Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2281-2283 (1993).

---

[10] Even in the context of criminal proceedings, in which due process requires that the government ultimately prove guilt beyond a reasonable doubt, state legislatures retain broad discretion to allocate subsidiary burdens of production and persuasion between the defense and prosecution. See *Medina* v. *California*, 112 S. Ct. 2572, 2577-2579 (1992).

This Court has noted, for example, that where one party is more likely to have information relevant to the facts at issue, it is both traditional and sensible to assign to that party the risk of non-persuasion. *Concrete Pipe*, 113 S. Ct. at 2281; see also *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-688 (1946). Similarly, in the absence of a statutory rule, the courts themselves, in adjudicating disputes arising under statutes, the Constitution, or the common law, may assign the burden of persuasion based on an assessment of the policies and evidentiary probabilities involved. See, *e.g.*, *Mount Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 284-287 (1977); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 244-250 (plurality opinion), 263-279 (O'Connor, J., concurring in the judgment) (1989); *Teamsters* v. *United States*, 431 U.S. 324, 358-362 & n.45 (1977); *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 246-248 (1942); *Summers* v. *Tice*, 199 P.2d 1, 3-4 (Cal. 1948); *McCormick on Evidence* § 337 (E. Cleary, 3d ed. 1984); see also *Basic Inc.* v. *Levinson*, 485 U.S. 224, 245-247 (1988).

In like fashion, administrative agencies are free, within the limits set by statute, to allocate the burden of persuasion on particular questions that arise in agency proceedings. Section 7(c) of the Administrative Procedure Act (APA) provides generally that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof" in formal agency hearings. 5 U.S.C. 556(d). As discussed below (see pages 34-43, *infra*), however, even where it applies, Section 7(c) imposes "only the burden of going forward, not the burden of persuasion." *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 404 n.7 (1983). Agencies have permissibly allocated the burden of persuasion in

different ways in different situations. See, *e.g.*, *Environmental Defense Fund, Inc.* v. *EPA*, 548 F.2d 998, 1003-1005 (D.C. Cir. 1976) (burden of persuasion on registrant in agency proceeding to suspend registered pesticide), cert. denied, 431 U.S. 925 (1977); *Old Ben Coal Corp.* v. *Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 39-40 (7th Cir. 1975) (burden on mine operator in proceeding to determine propriety of summary closure based on imminent danger); *Bowen* v. *Yuckert*, 482 U.S. 137, 146-147 n.5 (1987) (after Social Security disability claimant shows inability to do past work at step four of sequential evaluation process, burden of persuasion shifts to Secretary at step five to show claimant's ability to do other work; Court sustains "allocation of burdens of proof" as "well within the Secretary's 'exceptionally broad authority' under the statute"); *Rivers* v. *Schweiker*, 684 F.2d 1144, 1151, 1154-1155 (5th Cir. 1982) (also discussing allocation of burdens of persuasion under Social Security Act);[11] 38 C.F.R. 3.102 (doubts in veterans' benefits proceedings resolved in favor of claimant), subsequently adopted legislatively by 38 U.S.C. 5107; 21 C.F.R. 12.87(d) (in proceeding to amend or re-

---

[11] Similar rules concerning ability to work apply in determining total disability under the LHWCA and BLBA. See, *e.g.*, *Davis* v. *Director, OWCP*, 936 F.2d 1111, 1115-1116 (10th Cir. 1991) (BLBA); *Bumble Bee Seafoods* v. *Director, OWCP*, 629 F.2d 1327, 1328-1329 (9th Cir. 1980) (LHWCA); see also *Avondale Indus., Inc.* v. *Director, OWCP*, 977 F.2d 186, 190 (5th Cir. 1992); *General Ship Serv.* v. *Director, OWCP*, 938 F.2d 960, 961-962 (9th Cir. 1991) (both concluding that under the LHWCA, a claimant does not have to prove that the employer from whom he seeks benefits is the one responsible for paying them; that employer bears the "burden of proof").

voke order relating to safety or effectiveness of drugs or additives, "burden of proof" falls on party contending that product is safe or effective).

Against this background, there is nothing remarkable about the Secretary's determination that once an LHWCA or BLBA claimant has carried the burden of producing competent evidence that is sufficient (if unrebutted) to justify an award of benefits, the party opposing an award should bear not only the burden of producing contrary evidence, but also the ultimate risk that its rebuttal will not persuade the trier of fact, by a preponderance of the evidence, that the claimant is not entitled to an award. This Court has previously deferred to similar determinations by agencies charged with administering federal statutes. See *NLRB* v. *Transportation Management*, 462 U.S. at 401-403; *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-796 (1990); cf. *Steadman* v. *SEC*, 450 U.S. 91, 103-104 (1981) (discussing agency practice regarding standard of proof required to support decision). The same deference is appropriate in this case, unless the Secretary's allocation of the ultimate burden of persuasion to employers under the complex compensatory schemes at issue here is, as a matter of "policy and fairness based on experience" (*Keyes*, 413 U.S. at 209), unreasonable or inconsistent with some statutory command. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). It is neither, and it should therefore be upheld.

B. Application Of The "True Doubt" Rule Is A Longstanding And Reasonable Implementation Of The LHWCA And Furthers The Policies Underlying That Act

Since its enactment in 1927, the LHWCA has provided that claims adjudicators "shall not be bound

by common law or statutory rules of evidence or by technical or formal rules of procedure." 33 U.S.C. 923(a). That statutory command provides the Secretary with considerable flexibility in establishing procedures to ensure that proceedings are conducted "in such manner as to best ascertain the rights of the parties." *Ibid.* The LHWCA does not specify which party should bear the ultimate risk of non-persuasion, and for fifty years or more administrators and federal courts reviewing claims for benefits under the Act have applied some variation of the principle that "doubtful questions incapable of scientific resolution are to be resolved in favor of the workman." *F.H. McGraw & Co.* v. *Lowe*, 145 F.2d at 887 n.1, 888 (quoting 1943 administrative decision); see *Fidelity & Casualty Co.* v. *Burris*, 59 F.2d 1042, 1044 (D.C. Cir. 1932).[12] That principle, refined over time and now embodied in what has come to be known as the "true doubt" rule, has proven sound in practice and indeed has become an integral part of the administrative scheme.

In 1972, Congress amended the LHWCA to provide for the first time that hearings on benefits claims should be conducted by special hearing examiners (now administrative law judges) and in accordance with

---

[12] See also, *e.g.*, *Southern S.S. Co.* v. *Norton*, 101 F.2d 825, 827 (3d Cir. 1939); *Southern Pac. Co.* v. *Sheppeard*, 112 F.2d 147, 148 (5th Cir. 1940); *Friend* v. *Britton*, 220 F.2d 820, 821 (D.C. Cir.) cert. denied, 350 U.S. 836 (1955); *Young & Co.* v. *Shea*, 397 F.2d 185, 188, on petition for rehearing, 404 F.2d 1059, 1061 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969); *Parsons Corp.* v. *Director, OWCP*, 619 F.2d 38, 41 (9th Cir. 1980); *Noble Drilling Co.* v. *Drake*, 795 F.2d 478, 481 (5th Cir. 1986) (per curiam); *Avondale Shipyards, Inc.* v. *Kennel*, 914 F.2d 88, 90-91 (5th Cir. 1990) (per curiam); *Jones* v. *Director, OWCP*, 977 F.2d 1106, 1109 (7th Cir. 1992).

the adjudication provisions of the APA. Pub. L. No. 92-576, § 14, 86 Stat. 1261 (1972), amending 33 U.S.C. 919(d). The same amendments substantially revised the process for review of claims determinations, transferring the initial review function previously performed by the federal district courts to the newly created Benefits Review Board. Pub. L. No. 92-576, § 15, 86 Stat. 1261, amending 33 U.S.C. 921(b). But although Congress amended 33 U.S.C. 923(a) to insert a reference to the Board (in addition to deputy commissioners) (see Pub. L. No. 92-576, § 15(e), 86 Stat. 1262), it did not alter the language in that Section providing that the conduct of investigations, inquiries and hearings "shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure."

The legislative history of the 1972 amendments expresses some dissatisfaction with the previous lack of separation between administrative and adjudicative functions, and a desire to conform the LHWCA scheme to a model of administrative and judicial review that had proven successful in other workers' compensation contexts. *E.g.*, S. Rep. No. 1125, 92d Cong., 2d Sess. 13-15 (1972). There is no indication, however, of any similar dissatisfaction with basic principles, such as the "true doubt" rule, that had by that time become established in administrative and judicial practice under the Act. The congressional consideration of LHWCA adjudication issues evidenced by the 1972 amendments, the lack of any change in those amendments to established principles of adjudication under the Act, and the subsequent reaffirmation of the "true doubt" rule by the new independent hearing officers and Benefits Review Board, all reinforce the conclusion that the "true doubt" rule was (and remains) a permissible policy for the Secretary to adopt

in implementing the Act. Cf., *e.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974).

Assigning the risk of non-persuasion to the employer in claims adjudication is also reasonable as a matter of policy. The "true doubt" rule comports with the more general principle that the LHWCA is a remedial statute that should be construed liberally in favor of the employee or his dependents. See, *e.g.*, *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977); *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953). The longstanding assignment of "the burden of possible error on those best able to bear it," *F.H. McGraw & Co.* v. *Lowe*, 145 F.2d 886, 888 (2d Cir. 1944), flows naturally from the statute's purposes. Because the LHWCA was intended to provide injured workers and their survivors with "a certain and immediate recovery," *Abbott* v. *Louisiana Ins. Guar. Ass'n*, 889 F.2d 626, 632 (5th Cir. 1989), cert. denied, 494 U.S. 1082 (1990), the Secretary may permissibly conclude that, where the evidence is equally balanced, injured workers should not have to bear the ultimate risk of non-persuasion concerning "doubtful questions incapable of scientific resolution," *F.H. McGraw*, 145 F.2d at 887 n.1. See also *Fidelity & Casualty Co.* v. *Burris*, 59 F.2d at 1044. Moreover, the hazardous nature of longshore work, see S. Rep. No. 1125, 92d Cong., 2d Sess. 2 (1972), increases the probability that a reported injury will in fact be work-related. See also *Garrett* v. *Moore-McCormack Co.*, 317 U.S. at 246-248 (noting special rules historically fashioned to protect maritime workers, and fashioning burden-of-persuasion rule in accordance with that tradition).

Imposition of the risk of error on employers in cases where the evidence is equally balanced is hardly inequitable. In return for their participation in the overall benefits scheme, the LHWCA accords employers "definite and lower limits on potential liability than would have been applicable in common-law tort actions for damages." *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 281-282 (1980); see also *Grizzle* v. *Pickands Mather & Co.*, 994 F.2d 1093, 1101 (4th Cir. 1993) (Hall, J., dissenting) ("liberality toward claimants is the quid pro quo for employers' immunity from potentially ruinous common-law tort suits").[13]

The longstanding administrative practice of imposing the ultimate risk of non-persuasion on the employer rather than the employee thus does not conflict with the LHWCA. To the contrary, it is firmly rooted in the legal premises and remedial goals of the Act.

C. Application Of The "True Doubt" Rule Is An Appropriate Implementation Of The BLBA, And Rests In Part On A Reasonable Interpretation Of The Secretary's Own Regulations Under That Act

Many of the same considerations that support application of the "true doubt" rule under the LHWCA also support its application under the BLBA. In addition, under the BLBA, the "true doubt" rule rests on the Secretary's interpretation not only of the underlying Act itself, but also of his own implementing regulations.

---

[13] The LHWCA also provides employers with ample means to develop evidence relevant to contesting the claimant's eligibility for benefits. See, *e.g.*, 33 U.S.C. 907(d)(4); 20 C.F.R. 702.410(c) (employee must submit to employer's medical examination); 33 U.S.C. 907(c)(2) (employee who chooses his own physician must obtain employer's consent to change physicians).

When Congress in 1969 enacted the legislation that became the BLBA, it incorporated many provisions of the LHWCA, including its procedures for the processing and adjudication of claims. See 30 U.S.C. 932(a) (reprinted at App., *infra*, 3a-4a), incorporating, *inter alia*, 33 U.S.C. 919-921 (as well as 33 U.S.C. 923(a), discussed above). It is therefore not surprising that from the time that administration of the BLBA was assigned to the Department of Labor, petitioner, the Benefits Review Board and the courts have all applied the "true doubt" rule developed under the LHWCA to BLBA cases as well.[14] As in the case of the LHWCA, the BLBA contains broad grants of regulatory and procedural authority, and no provision restricting allocation of the burden of persuasion in claims proceedings. See 30 U.S.C. 902(f), 936(a) and 957 (regulatory authority); 30 U.S.C. 932(a) (incorporating procedural provisions, including 33 U.S.C. 923(a), from the LHWCA). There is therefore no statutory basis for rejecting the Secre-

---

[14] See, *e.g.*, Pet. App. 19a n.3; 43 Fed. Reg. 36,826 (1978); Coal Mine (BLBA) Procedure Manual ch. 2-100, ¶ 3(b)(2) (Feb. 1980); *Lesicko* v. *Peabody Coal Co.*, 1 Black Lung Rep. (MB) 1-87, 1-91 (Ben. Rev. Bd.), aff'd on reconsideration, 1 Black Lung Rep. (MB) 1-276, 1-282 (Ben. Rev. Bd. 1977), rev'd on other grounds, 581 F.2d 121 (7th Cir. 1978); *Provance* v. *U.S. Steel Corp.*, 1 Black Lung Rep. (MB) at 1-486; *Skukan* v. *Consolidation Coal Co.*, 993 F.2d 1228, 1238 (6th Cir. 1993), petition for cert. pending, No. 93-964; *Freeman United Coal Mining Co.* v. *OWCP*, 988 F.2d 706, 710 (7th Cir. 1993) (per curiam) (citing cases), petition for cert. pending, No. 93-935; *Greer* v. *Director, OWCP*, 940 F.2d 88, 90 & n.3 (4th Cir. 1991). Prior to the decision in *Greenwich Collieries*, the Third Circuit itself had approved use of the rule in BLBA cases. See *Kowalchick* v. *Director, OWCP*, 893 F.2d 615, 621 (1990); *Bonessa* v. *United States Steel Corp.*, 884 F.2d 726, 730 (1989).

tary's use of the "true doubt" rule. Compare *Pauley* v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991) (approving deference to Secretary in connection with BLBA's "complex and highly technical regulatory program").

Moreover, and again as in the case of the LHWCA, application of the "true doubt" rule is consistent with congressional intent. The Senate Report accompanying the 1972 amendments to the BLBA states that the Act "is intended to be a remedial law * * *. In the absence of definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled miner or his survivors." S. Rep. No. 743, 92d Cong., 2d Sess. 11 (1972). When Congress amended the BLBA again in 1978, the Senate Report "underscore[d] and reaffirm[ed]" the earlier intention that doubts should be resolved in favor of the claimant, and stated that the Secretary of Labor (who first received authority to define "total disability" and establish appropriate "criteria" in 1978, see *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 110 (1988)) was expected to promulgate standards that give the benefit of any doubt to the miner.[15] S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977); see also *Freeman United Coal Mining Co.* v. *OWCP*, 988 F.2d at 709-710 & n.5.

---

[15] Between the 1972 and 1978 amendments, the Department explicitly brought to Congress's attention, in discussing the "burden of proof" under the black lung statute, that "conflicts in the evidence are required to be resolved by the adjudicator in favor of the claimant." See N. Snyder & M. Solomons, *Black Lung—A Study in Occupational Disease Compensation* 30-31 (1976), *reprinted in Black Lung Benefits Reform Act, 1976: Hearings on H.R. 10760 and S. 3183 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 459, 488-489 (1976).

The Secretary's current implementing regulations, promulgated under authority of the 1978 amendments (see 20 C.F.R. 718.1(a)), reflect those expressions of congressional intent, while at the same time ensuring that claimants produce sufficient evidence to support their entitlement before benefits may be awarded. Thus, 20 C.F.R. 718.3(c) provides:

> Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis. This part shall be construed and applied in that spirit and is designed to reflect that intent. However, no claim shall be approved unless the record considered as a whole, in light of any applicable presumptions, provides a reasonable basis for determining that the criteria for eligibility under the Act and this part have been met.

While Section 718.3(c) is not the original source of the "true doubt" rule, it embodies the same balance between requiring claimants to adduce sufficient evidence of eligibility, and giving claimants the benefit of the doubt in the limited class of cases in which conscientious evaluation leaves the adjudicator unable to conclude that either side has supplied more persuasive evidence than the other on a particular point.[16] As least in adjudications covered by the reg-

---

[16] The final sentence of Section 718.3(c) also refutes the notion that application of the "true doubt" rule seeks to "recreate" the statutory presumptions that Congress repealed in 1981. See *Freeman United Coal Mining Co.* v. *OWCP*, 999 F.2d 291, 293 (7th Cir. 1993) (statement of Easterbrook, J., respecting suggestion of rehearing en banc). That sentence requires a claimant to produce sufficient evidence to support an award of benefits—in general, to support findings that he has pneumoconiosis, that he is totally disabled, and that the

ulations in Part 718, application of the "true doubt" rule is grounded not only in a permissible construction of the underlying statute and practical implementation of its remedial policies, but in the Secretary's interpretation of his own regulations. That interpretation is neither plainly erroneous nor inconsistent with the regulation's language, and it is therefore entitled to "controlling weight." *E.g.*, *Stinson* v. *United States*, 113 S. Ct. 1913, 1919 (1993); see also *Mullins Coal*, 484 U.S. at 159-160.

Another section of the Secretary's regulations implementing the BLBA, 20 C.F.R. 718.403, provides that "[e]xcept as provided in this subchapter [20 C.F.R. Pts. 718-727], the burden of proving a fact alleged in connection with any provision of this part shall rest with the party making such allegation." The court of appeals mistakenly concluded in *Greenwich Collieries* (Pet. App. 8a-11a) that Section 718.403 imposes the burden of persuasion on a BLBA claimant, and therefore precludes application of the "true doubt" rule. The Secretary, however, construes Section 718.403 to allocate only the burden of production, not the burden of persuasion.[17] As dis-

---

disability is due to the disease. See 20 C.F.R. 718.201-718.206. The "true doubt" rule comes into play only after the claimant has met that burden and the employer has introduced equally (but not more) probative evidence contesting eligibility. The repealed presumptions did not require claimants to produce such evidence on each element necessary for entitlement. See 30 U.S.C. 921(c)(2) and (4), (5).

[17] In this respect, we likewise disagree with the Sixth Circuit's statement in *Skukan*, 993 F.2d at 1238, that Section 718.403 "assigns the burden of persuasion to the claimant." If Section 718.403 were construed to allocate the burden of persuasion, it would conflict with Section 718.3(c), which requires that the regulations be "construed and applied" to

cussed below (see pages 34-40, *infra*), this Court has correctly construed the phrase "burden of proof" in Section 7(c) of the APA in the same manner. *Transportation Management*, 462 U.S. at 404 n.7 In any event, the phrase "burden of proof" or "burden of proving" is not self-defining; it may refer to the burden of either production or persuasion. See also, *e.g.*, *Ward's Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 660 (1989); *Black's Law Dictionary* 196 (6th ed. 1990); 9 J. Wigmore, *supra*, §§ 2485-2488; *Hazardous Waste Treatment Council* v. *EPA*, 886 F.2d 355, 366-367 (D.C. Cir. 1989) (per curiam) (construing regulation imposing "burden of proving" certain facts to allocate burden of production), cert. denied, 498 U.S. 849 (1990). Because, again, the Secretary's construction of his regulation is neither plainly erroneous nor inconsistent with the text of the regulation itself, it must control.[18] *Stin-*

---

give claimants "the benefit of all reasonable doubt" as to the eixstence of death or disability due to pneumoconiosis. See *Skukan*, 993 F.2d at 1238. Any such conflict would be resolved in favor of Section 718.3(c) (and application of the "true doubt" rule) by the introductory clause of Section 718.403: "Except as provided in this subchapter, * * *." Section 718.3(c), as construed by the Secretary, makes special provision for situations of "true doubt."

[18] The court of appeals based its decision in *Greenwich Collieries* in part on the premise that application of the "true doubt" rule is inconsistent with this Court's decision in *Mullins Coal*. Pet. App. 5a-6a. *Mullins* upheld the Secretary's view that the "interim presumption" regulation applicable to older BLBA claims (see note 4, *supra*), which provides that a claimant may invoke a presumption of eligibility by "establish[ing]" one of several predicate facts (20 C.F.R. 727.203(a)), requires an evaluation of all relevant evidence adduced by both parties in determining whether a particular invocation fact has been established. 484 U.S. at 146-152. It did

son, 113 S. Ct. at 1919; *Mullins Coal*, 484 U.S. at 159-160.

Policy considerations similar to those under the LHWCA also support application of the "true doubt" rule in black lung cases. Like the LHWCA, the BLBA is a remedial workers' compensation statute that Congress intended to be liberally construed. The BLBA is based on Congress's recognition that in addition to more obvious dangers, coal mining can lead gradually and insidiously to respiratory disabilities the precise causes and effects of which may be difficult to establish with medical or legal certainty. See *Mullins Coal*, 484 U.S. at 158; *Collins* v. *Old Ben Coal Co.*, 861 F.2d 481, 489 (7th Cir. 1988). Claimants are often sick or elderly individuals who have limited resources. See Employment Standards Admin., U.S. Dep't of Labor, *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* 14-18 (1983). To be sure, the compensation scheme must and does afford

---

not, as the court of appeals believed (Pet. App. 6a), mandate that a claimant proceeding under a different set of regulations establish his entitlement to benefits without use of the "true doubt" rule. The Court did state, in the last footnote to the opinion, that the regulation at issue in that case "requires a claimant to prove an invocation fact by a preponderance of the evidence." 484 U.S. at 161 n.35. In discussing the *employer's* burden under the same regulation, however, the Court explicitly noted the use of the "true doubt" rule, which "ensures that the employer will win, on invocation or rebuttal, only when its evidence is *stronger* than the claimant's." 484 U.S. at 144 n.12; see also *id.* at 156 n.29. Quite aside from the fact that *Mullins* deferred to the Secretary's interpretation of a regulation that is not at issue in these cases, it would be extremely odd to read that decision to prohibit use of an evidentiary rule the existence and effect of which were explicitly recognized in the Court's opinion.

mine employers a full opportunity to ascertain and demonstrate that a particular claim lacks merit.[19] See, *e.g.*, 20 C.F.R. 718.402, 725.409(a)(1) (claimant must provide medical records and submit to examination by employer's physician); 725.414(a) (development of employer's evidence); see also *Woodward* v. *Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993) (discussing effect of cumulative evidence typically produced by employers' medical experts). In implementing the BLBA, however, the Secretary is surely within the bounds of his discretion in determining that after all the evidence has been developed by the parties and conscientiously weighed, the residual risk of uncertainty should be placed on mine operators rather than on individual claimants.[20]

---

[19] The opportunity provided appears to be adequate. In recent years the approval rate for BLBA claimants, with full application of the "true doubt" rule, has been approximately 7%. Employment Standards Admin., U.S. Dep't of Labor, *Black Lung Benefits Act, Annual Report on Administration of the Act During Calendar Year 1991*, at 21 (1992).

[20] As the BRB has held, an ALJ should find the evidence in equipoise, and therefore apply the "true doubt" rule, only after carefully considering all of the evidence adduced by both parties and exhausting all methods of evaluating it. See *Betz* v. *Arthur Snowden Co.*, 14 Ben. Rev. Bd. Serv. (MB) 805, 808 (1981) (ALJ "must indicate with some specificity what evidence he believes or disbelieves and why" before applying the "true doubt" rule); cf. *Medina* v. *California*, 112 S. Ct. at 2579 (allocation of burden of persuasion affects only "a narrow class of cases where the evidence is in equipoise"). In *Greenwich Collieries* petitioner believes, as the government argued in the court of appeals, that the ALJ adequately evaluated the conflicting x-ray evidence of the existence of pneumoconiosis and permissibly applied the "true doubt" rule to resolve that issue. Gov't C.A. Br. 39-42. The ALJ's opinion does not, however, reflect an adequate evaluation or weighing of the evidence concerning whether the claimant was totally

II. THE "TRUE DOUBT" RULE DOES NOT CONTRAVENE SECTION 7(c) OF THE ADMINISTRATIVE PROCEDURE ACT

The court of appeals held in *Maher Terminals* that Section 7(c) of the APA, 5 U.S.C. 556(d), independently imposes the burden of persuasion on a benefits claimant. J.A. 17-18, 24. It further held that so long as the burden of persuasion rests on the claimant, application of the "true doubt" rule violates the APA's additional requirement that the party bearing that burden prove his case by a preponderance of the evidence. We agree that the "true doubt" rule, in the narrow circumstances in which it applies, allocates the risk of non-persuasion to the employer. That allocation, however, does not contravene the APA, both because Section 7(c) allocates only the burden of production (not the burden of persuasion), and because claims adjudications under the BLBA and LHWCA are not in any event governed by Section 7(c).

A. Section 7(c) Imposes Only A Burden Of Production, Which A Claimant Must Meet Before The "True Doubt" Rule May Be Applied

As the court of appeals recognized (J.A. 16-19), Section 7(c) of the APA addresses two separate questions: the burden imposed upon the proponent of a particular agency order, and the standard of proof that must be met by whichever party bears the burden of persuasion. The first of those questions

---

disabled. The ALJ therefore did not properly justify her resort to the "true doubt" tie-breaker on that issue, and the case should be remanded with instructions to the ALJ either to weigh and resolve the conflict in the evidence, or to explain a finding that after careful evaluation the evidence remains in equipoise. See *id.* at 42-45.

is addressed by the first sentence of Section 7(c), which provides: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." This Court has previously concluded that this sentence requires only that the party advocating a particular result bear the burden of *production* with respect to that issue. *Transportation Management*, 462 U.S. at 404 n.7.

The second question identified by the court of appeals is addressed by the third sentence of Section 7(c), which provides: "A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." This Court has held that the third sentence of Section 7(c) requires only that the party who bears the burden of persuasion on an issue must establish its position by a preponderance of the evidence, in the absence of a separate statutory (or, presumably, regulatory) provision imposing a higher standard. *Steadman*, 450 U.S. at 98-102.

Transportation Management and *Steadman*, read both separately and together, permit use of the "true doubt" rule. Under *Transportation Management*, Section 7(c) requires only that the claimant come forward with sufficient evidence to support a ruling in favor of an award of benefits.[21] See generally

---

[21] Section 7(c)'s allocation of the burden of production applies only "[e]xcept as otherwise provided by statute." Section 20(a) of the LHWCA, 33 U.S.C. 920(a), provides a presumption, "in the absence of substantial evidence to the contrary," that a claim comes within the provisions of the Act. That presumption places a burden of production on the employer, but ceases to have any effect once the employer meets that burden. See generally *U.S. Indus./Federal Sheet Metal,*

McCormick, *supra*, § 338; 9 J. Wigmore, *supra*, § 2487. After the claimant has met that burden of production and the employer has introduced contrary evidence, the factfinder may find, after conscientious evaluation, that the evidence on both sides is in equipoise. In such cases, *Transportation Management* permits an agency to assign the risk of non-persuasion to the party opposing an award of benefits.

Steadman does not divest an agency of the authority that *Transportation Management* recognizes, because *Steadman* does not address the allocation of the burden of persuasion. *Steadman* holds only that in the absence of other authority, the third sentence of Section 7(c) prescribes that whoever bears the burden of persuasion may carry that burden by a preponderance of the evidence—a standard that "results in a roughly equal allocation of the risk of error between litigants." *Grogan* v. *Garner*, 498 U.S. 279, 286 (1991). That is the standard applied under the "true doubt" rule. Indeed, the court of appeals itself acknowledged that "*Steadman*, standing alone, does not allocate the burden of persuasion, but rather defines its scope as a preponderance of the evidence." J.A. 17.

The court of appeals also acknowledged more broadly that *Transportation Management*, *Steadman*, Section 7(c) and the "true doubt" rule may be harmonized in the manner we propose. J.A. 15-17, 19. The Court rejected that conclusion, however, on the

---

Inc. v. *Director, OWCP*, 455 U.S. 608, 612 n.5 (1982); *Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935). At that point, in order to prevail, the claimant must still adduce evidence that is both sufficient to justify a finding in his favor and—under the "true doubt" rule—at least equal in overall weight to the evidence adduced by the employer.

ground that if Section 7(c) requires particular agency action to be supported by a preponderance of the evidence, "the inevitable conclusion is that the proponent of that [action] must bear the burden of persuasion." J.A. 19. That conclusion, however, is by no means "inevitable." Indeed, it is contrary to the available evidence of congressional intent and to established precedent, internally inconsistent, and unsound as a matter of policy.

1. The language of Section 7(c) does not compel the court of appeals' construction. As the court itself acknowledged (Pet. App. 8a-9a), the term "burden of proof" used in the first sentence of that section may refer to a burden of either persuasion or production, and this Court held in *Transportation Management* that it prescribes only a burden of production. As just discussed, there is no inconsistency between reading the first sentence to impose only a burden of production and giving full effect to the third sentence, which speaks to the nature of the evidence that must be produced to sustain agency action. In a "true doubt" case, both parties will have produced evidence that, standing alone, would meet the requirements imposed by the third sentence. Because each party's evidence stands not alone, however, but in balance with the other's, the question remaining to be resolved is which of the equivalent but opposite showings is to prevail. As to that question, the text of Section 7(c) is silent. The statute therefore allows the Secretary to allocate the risk of non-persuasion in this setting to the party (the employer) who is the proponent of an order denying benefits.

The court of appeals held, however, that the third sentence of Section 7(c) allocates the burden of persuasion to the claimants in these cases. J.A. 15-16,

17-20. That conclusion is difficult to reconcile with the text and structure of Section 7(c): if any portion of that Section were to be read to allocate the burden of persuasion, it would be the *first* sentence, which uses the phrase "burden of proof." It would be strange to find an implicit allocation of the burden of persuasion in the third sentence, which does not refer to the "burden of proof" at all.

This understanding of the text of Section 7(c) is confirmed by the legislative history. The House and Senate Reports make clear that the term "burden of proof" in Section 7(c) was indeed used to mean "burden of production." See H.R. Rep. No. 1980, 79th Cong., 2d Sess. 36 (1946); S. Rep. No. 752, 79th Cong., 1st Sess. 22 (1945) (burden of proof means "that the party initiating the proceeding has the general burden of coming forward with a prima facie case").[22] The Reports also indicate that the term "proponent" is not limited to a party who initiates an agency proceeding, "but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain." *Ibid.* If both (or multiple) parties are "proponents" with their own burdens of "proof" on the central issue of whether the agency should take action, the term must mean "burden of production." Two or more parties can each have a burden of production on the same issue, but only one party can have the ultimate burden of

---

[22] The *Attorney General's Manual on the Administrative Procedure Act* 75 (1947), to which this Court has given some deference (see, *e.g.*, *Darby* v. *Cisneros*, 113 S. Ct. 2539, 2545 n.10 (1993)), also recognizes that "[t]here is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden of going forward.'"

persuasion. Thus, the legislative history confirms that the first sentence of Section 7(c) does not allocate the burden of persuasion.

The APA's history similarly provides scant support for the court of appeals' holding that the third sentence of Section 7(c) nevertheless imposes the burden of persuasion on the proponent of agency action. As the court itself recognized, that history, read together with *Steadman*, provides at least equal support for the proposition that "the party who seeks a denial of relief is *also* required" to prove its case by a preponderance of the evidence. J.A. 19; see H.R. Rep. No. 1980, *supra*, at 36; S. Rep. No. 752, *supra*, at 22 ("the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by that kind of evidence"). There is no statutory or other warrant for concluding that the APA was intended to resolve those competing requirements through application of an absolute—yet unstated—rule that always places the risk of non-persuasion on the party seeking to change whatever happens to be the *status quo* when a request for agency action is made. It is both more sensible and more consonant with the traditional flexibility of the administrative process to construe Section 7(c) to allow the agency responsible for implementing a statute to determine, in light of all relevant considerations, which party should bear that risk in the particular statutory context.

Our analysis of Section 7(c), unlike that of the court below, is well established. The leading court of appeals case analyzed the issue thoroughly more than 17 years ago and concluded that the APA imposes only a burden of production, not a burden of persuasion. *Environmental Defense Fund, Inc.* v. *EPA*,

548 F.2d at 1004, 1013-1015. Other courts of appeals and commentators—not mentioned by the Third Circuit in the decisions below—have consistently reached the same conclusion.[23] This Court was therefore correct in adopting that reading of Section 7(c) in *Transportation Management*, 462 U.S. at 404 n.7 (citing *Environmental Defense Fund, supra*).[24] There is no reason to abandon that holding in this case.

2. The court of appeals' decision is also internally inconsistent. Apparently recognizing that imposition of the burden of persuasion on the proponent of

[23] See, *e.g.*, *Skukan*, 993 F.2d at 1235-1239; *Freeman United*, 988 F.2d at 711; *Dazzio* v. *FDIC*, 970 F.2d 71, 77 (5th Cir. 1992); *Merritt* v. *United States*, 960 F.2d 15, 18 (2d Cir. 1992); *Hazardous Waste Treatment Council*, 886 F.2d at 366-368; *Alameda County Training & Employment Bd.* v. *Donovan*, 743 F.2d 1267, 1269 (9th Cir. 1984); *Maine* v. *United States Dep't of Labor*, 669 F.2d 827, 829 (1st Cir. 1982); *Old Ben Coal Corp.*, 523 F.2d at 39-40; 4 J. Stein *et al.*, *Administrative Law* § 24.02, at 24-21 n.3 (1993); 3 K. Davis, *Administrative Law Treatise* § 16.9, at 257-258 (2d ed. 1978).

[24] The court of appeals sought to avoid the force of *Transportation Management* on the ground that this Court had construed only the first sentence of Section 7(c). See J.A. 16. The beginning of this Court's discussion did paraphrase the first sentence of Section 7(c), noting that "the proponent of an order has the burden of proof." 462 U.S. at 404 n.7. But the Court's rejection of Transportation Management's argument based on Section 7(c) did not suggest that it was responding only to an argument based on one sentence, or that it was reserving judgment on the effect of some other portion of the same Section. The Court stated: "Section 7(c), however, determines only the burden of going forward, not the burden of persuasion." *Ibid.* The Court's initial paraphrasing of the first sentence simply reflects the fact that it is only that sentence, with its reference to the "burden of proof," that could plausibly be read to allocate the burden of persuasion.

agency action as to every issue in every proceeding would be neither reasonable nor consistent with this Court's precedents, the court acknowledged (J.A. 21) what it termed a "logical exception" for "affirmative defenses" like that at issue in *Transportation Management*. The court identified, however, no textual basis for the "logic" of that exception, and none suggests itself (other than the need to reconcile the holding below with that of *Transportation Management*). Compare 4 J. Stein *et al.*, *Administrative Law* § 24.02, at 24-28 to 24-31 (1993) (discussing different treatments of "affirmative defenses" in administrative proceedings).[25] In any event, if ex-

[25] The result of a party's successful interposition of an affirmative defense is the denial of the order that the proponent seeks—the same result that follows if the party successfully opposes the proponent's claim in some other manner, such as by rebutting his affirmative case. If, as the court of appeals held, the text of Section 7(c) always requires the proponent of an order to bear the burden of persuasion, that requirement would seem to apply equally to issues raised by other parties in affirmative defenses. That result, of course, would make no sense in the vast majority of cases involving affirmative defenses, as the court of appeals acknowledged. The proper conclusion to be drawn from that insight, however, is not that there is an implied exception (for affirmative defenses) to an otherwise absolute rule that the burden of persuasion rests on the party who initiates an agency proceeding, with respect to all issues in the proceeding. Rather, the proper conclusion is that Section 7(c) allows the agency to allocate the burden of persuasion (after the proponent carries his initial burden of production), taking account of various statutory and evidentiary policies—including, for example, that the agency has concluded that a particular issue raised by another party should be regarded as in the nature of an affirmative defense. See *Transportation Management*, 462 U.S. at 400, 402. Moreover, the National Labor Relations Act, at issue in *Transportation Management*, expressly pro-

ceptions are to be made to a burden of persuasion otherwise imposed (in the court of appeals' view) by Section 7(c), it would be at least as "logical" to craft one for the principle on which the Secretary relies in these cases: that in particular statutory contexts an agency is entitled to conclude, on the basis of its factual and policy expertise, that where both the proponent and the opponent of agency action have produced substantial and essentially equivalent probative evidence, the doubt should be resolved in favor of action (or, in this case, the provision of benefits).

3. Finally, the court of appeals' decision, which *requires* agencies to allocate the risk of nonpersuasion in the same manner regardless of the context or circumstances, itself contravenes the policy of the APA, which was not intended to impose undue restrictions on government operations. See 5 U.S.C. 556(d); S. Rep. No. 752, *supra*, at 5, 22; H.R. Rep. No. 1980, *supra*, at 16, 36. As discussed above (see pages 19-20, *supra*), allocation of the burden of persuasion in civil litigation is a matter generally left to the courts, to be resolved as a matter of "policy and fairness based on experience in * * * different situations." *Keyes*, 413 U.S. at 209. Agencies have typically operated under similar principles (see pages 20-22, *supra*), and Section 7(c) should not

---

vides that a violation may be found only "upon a preponderance of the testimony" before the Board. 29 U.S.C. 160(c). The Court held that the allocation of the burden of persuasion to the employer on the "affirmative defense" was permissible despite that general statutory allocation. See 462 U.S. at 401-403. In this case, by contrast, neither the BLBA nor the LHWCA contains such a provision that allocates the burden of persuasion to the claimant, and Section 7(c) does not impose such a requirement government-wide where the particular statute at issue does not do so.

now be construed to render the rules governing administrative proceedings more rigid than those applicable in judicial proceedings. Compare 33 U.S.C. 923(a) ("common law or statutory rules of evidence" and "technical or formal rules of procedure" do not govern LHWCA hearings); 30 U.S.C. 932(a) (incorporating same provision into BLBA).

B. Adjudications Under The BLBA And The LHWCA Are Not, In Any Event, Governed By Section 7(c)'s "Burden Of Proof" Provision

Section 7(c) of the APA imposes the "burden of proof" on the proponent of agency action "[e]xcept as otherwise provided by statute." 5 U.S.C. 556(d). That exception removes the BLBA and the LHWCA from the purview of Section 7(c), regardless of whether that Section imposes a burden of production or the burden of persuasion.

1. The Federal Mine Safety and Health Act, of which the BLBA is a part, states that "[e]xcept as otherwise provided in this chapter [30 U.S.C. 801-962], the provisions of sections 551 to 559 and sections 701 to 706 of title 5 shall not apply to the making of any order, notice, or decision made pursuant to this chapter, or to any proceeding for the review thereof." 30 U.S.C. 956. Thus, as a general matter, the Act expressly renders 5 U.S.C. 556(d) and other APA provisions inapplicable to proceedings under the BLBA.

Section 422(a) of the BLBA, 30 U.S.C. 932(a), does incorporate certain provisions of the LHWCA, including 33 U.S.C. 919(d). Section 919(d) provides that hearings under the LHWCA are to be conducted in accordance with 5 U.S.C. 554, and Section 554(c)(2) in turn provides that hearings will be governed by Sections 556 and 557. The incorpora-

tion of LHWCA and APA provisions in Section 422(a) of the BLBA is itself subject to an exception, however, where "otherwise provided * * * by regulations of the Secretary."[26] 30 U.S.C. 932(a). Although 20 C.F.R. 725.452(a) provides generally that hearings shall be conducted in accordance with 5 U.S.C. 554 *et seq.*, it too applies only "[e]xcept as otherwise provided by this part." Another section in Part 725—20 C.F.R. 725.4(a)—provides that "Part 718 of this subchapter, which contains the criteria and standards to be applied in determining whether a miner is or was totally disabled * * * [or] died due to pneumoconiosis, shall be applicable to the determination of claims under this part." As discussed above (see pages 29-30, *supra*), Section 718.3(c) of the regulations states that a BLBA claimant shall be "given the benefit of all reasonable doubt," and embodies the principle of the "true doubt" rule. That rule is therefore "otherwise provided * * * by regulations of the Secretary" within the meaning of 30 U.S.C. 932(a), and supersedes anything to the contrary in Section 7(c) of the APA.

This regulatory recognition of the "true doubt" rule is consistent with Congress's intent to incorpo-

[26] The Secretary's authority under this exception has been recognized in various appellate cases. See, *e.g.*, *West* v. *Director, OWCP*, 896 F.2d 308, 310 (8th Cir. 1990); *Patton* v. *Director, OWCP*, 763 F.2d 553, 559-560 (3d Cir. 1985); *Director, OWCP* v. *Bivens*, 757 F.2d 781, 785-786, 787-788 (6th Cir. 1985). Dicta in some other cases suggest that there may be limits on the Secretary's authority to supersede the APA's requirements by regulation, but none of those cases involved Section 7(c). See *U.S. Pipe & Foundry Co.* v. *Webb*, 595 F.2d 264, 273-274 (5th Cir. 1979); *Director, OWCP* v. *Alabama By-Prods. Corp.*, 560 F.2d 710, 718 (5th Cir. 1977); *Director, OWCP* v. *Peabody Coal Co.*, 554 F.2d 310, 341 (7th Cir. 1977).

rate the specified LHWCA provisions into the BLBA "to the extent the Secretary determines them applicable" and to allow the Secretary "adequate flexibility" in administering the black lung program. 115 Cong. Rec. 39,996 (1969) (summary of conference report). For the reasons discussed above, Congress also intended the Secretary to promulgate standards that give miners the benefit of the doubt. The text and purposes of the BLBA thus both support the conclusion that the Secretary would be within his discretion in applying the "true doubt" rule, even if it were otherwise thought to be inconsistent with a more general burden of persuasion requirement under the APA.

2. The LHWCA's provisions also satisfy the "except as otherwise provided" language of Section 7(c). That language does not require that the superseding statutory provision refer expressly to Section 7(c) itself, to the APA, or even to "burdens of proof."[27] As discussed above (see pages 22-24, *supra*), 33 U.S.C. 923(a) provides as a general rule that in conducting an investigation or hearing under the LHWCA, "the deputy commissioner or Board shall not be bound by common law or statutory rules

[27] See, *e.g.*, *Panhandle Producers & Royalty Owners Ass'n* v. *Economic Regulatory Admin.*, 822 F.2d 1105, 1111 (D.C. Cir. 1987) (implicit intent from language of statute); *Stearns Elec. Paste Co.* v. *EPA*, 461 F.2d 293, 305 & n.39 (7th Cir. 1972) (Stevens, J.), and *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 439 F.2d 584, 593 (D.C. Cir. 1971) (legislative history); *NLRB* v. *Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965) (purposes of statute), cert. denied, 384 U.S. 972 (1966); cf. 5 U.S.C. 559 (provisions in 5 U.S.C. 551-559 will apply to a subsequently enacted statute unless the statute *expressly* supersedes or modifies them).

of evidence or by technical or formal rules of procedure." That section authorizes Departmental adjudicators to apply the "true doubt" rule.

Section 923(a)'s general rule is of course subject to exceptions "as provided by this chapter." As in the case of the BLBA (into which the relevant LHWCA provisions are incorporated), 33 U.S.C. 919(d) provides that hearings "shall be conducted in accordance with the provisions of section 554 of title 5," and 5 U.S.C. 554(c)(2) requires that hearings comply with 5 U.S.C. 556(d) (Section 7(c) of the APA). Rather than allowing the entire argument to become circular, however, Section 7(c)'s introductory clause ("Except as otherwise provided by statute") should be read to preserve the general flexibility concerning evidentiary and procedural rules prescribed by Section 23(a) of the LHWCA, 33 U.S.C. 923(a).

That reading of the APA and LHWCA is the one most consistent with congressional intent. As discussed above (see pages 22-23, *supra*), the principle that doubts are to be resolved in favor of the claimant was already established as a rule of construction under the LHWCA when the APA was enacted. There is no indication that Congress intended the APA to revise the LHWCA by reversing that settled practice. See *Attorney General's Manual*, *supra*, at 75 (considering it "clear" that Section 7(c) "was not intended to repeal specific provisions of other statutes"). Indeed, Congress did not amend 33 U.S.C. 919(d) to provide for hearings to be held in accordance with 5 U.S.C. 554 until 1972, and there is no indication that in doing so it intended to overturn the "true doubt" rule. The amendment was motivated by quite different concerns.[28] Especially in this setting, Section 7(c)'s cautionary introductory phrase, "[e]xcept as otherwise provided by statute," should be construed to preserve well-established evidentiary rules that have developed under particular statutory and administrative schemes, such as use of the "true doubt" rule under the LHWCA. See *Steadman*, 450 U.S. at 103-104 (consistent pre- and post-APA practice is persuasive evidence of Congressional intent); *Mastro Plastics*, 354 F.2d at 176 (refusing to read Section 7(c) "to disturb the traditional allocation of the burden of going forward between the parties to an adjudicative proceeding").[29]

---

[28] Until 1972, deputy commissioners investigated, held hearings, and issued final administrative decisions, 33 U.S.C. 919(c) and (d) (1964), which appeared inconsistent with the principle under the APA that an agency employee engaged in the investigation or prosecution of a case not participate in its decision. See 5 U.S.C. 554. In 1972, Congress transferred the adjudicatory functions from deputy commissioners to ALJs and required LHWCA hearings to comply with the APA. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 14, 86 Stat. 1251, 1261 (1972). Nothing in the legislative history of those amendments indicates an intent to disturb the Department's use of the "true doubt" rule. See S. Rep. No. 1125, 92d Cong., 2d Sess. 13, 23 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 11, 21 (1972); 118 Cong. Rec. 36,385 (1972).

[29] *Mastro Plastics* involved the NLRB's requirement that an employer come forward with evidence of job availability in a back pay proceeding. Courts apply a similar rule under the LHWCA, requiring that an employer at least come forward with evidence of job availability to establish that an employee is not totally disabled. See note 11, *supra*. Congress rejected a proposal to reverse those court decisions when it amended the LHWCA in 1984, and thus must not have thought them inconsistent with its incorporation of the APA's provi-

CONCLUSION

The judgments of the court of appeals should be reversed, and the cases should be remanded for further proceedings.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

EDWIN S. KNEEDLER
Deputy Solicitor General

EDWARD C. DUMONT
Assistant to the Solicitor General

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

STEVEN J. MANDEL
Deputy Associate Solicitor

EDWARD D. SIEGER
Senior Appellate Attorney
Department of Labor

FEBRUARY 1994

---

sions into the LHWCA more than ten years earlier. See *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981: Hearings on S. 1182 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. 188-189 (1981) (statement of Samuel J. Smith, Chief Admin. Appeals Judge, BRB); 127 Cong. Rec. 9831 (1981).

APPENDIX

1. Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d), provides in part:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

2. Pertinent provisions of the Department of Labor's regulations implementing the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, provide as follows:

20 C.F.R. 718.3(c) provides:

> In enacting [the Black Lung Benefits] Act, Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis. This part shall be construed and applied in that spirit and is designed to reflect that intent. However, no claim shall be approved unless the record considered as a whole, in light of any applicable presumptions, provides a reasonable basis for determining that the criteria for eligibility under the Act and this part have been met.

20 C.F.R. 718.403 provides:

> Except as provided in this subchapter, the burden of proving a fact alleged in connection with any provision of this part shall rest with the party making such allegation.

20 C.F.R. 725.452(a) provides in pertinent part:

> Except as otherwise provided by this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. 554 et seq.

3. Section 19(d) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 919(d), provides in pertinent part:

> Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of title 5. Any such hearing shall be conducted by a[n] administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

4. Section 23(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 923(a), provides in pertinent part:

> (a) In making an investigation or inquiry or conducting a hearing the deputy commissioner of Board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.

5. Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. 932(a) provides:

> Subject to section 28(h)(1) of the Longshore and Harbor Workers' Compensation Act Amendments of 1984, during any period after December 31, 1973, in which a State workmen's compensation law is not included on the list published by the Secretary under section 931(b) of this title, the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927) as amended [33 U.S.C. 901 *et seq.*], as it may be amended from time to time (other than the provisions contained in sections 1, 2, 3, 4, 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof) [33 U.S.C. 901-904, 908-910, 912-913, 929-933, 937-938, 941, 943-948, 949-950], shall (except as otherwise provided in this subsection or by regulations of the Secretary and except that references in such Act to the employer shall be considered to refer to the trustees of the fund, as the Secretary considers appropriate and as is consistent with the provisions of section 9501(d) of title 26), be applicable to each operator of coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine, or with respect to entitlements established in paragraph (5) of section 921(c) of this title. In administering this part, the Secretary is authorized to prescribe in the Federal Register such additional provisions, not inconsistent with those specifically excluded by this subsection, as he deems necessary to provide for the payment

of benefits by such operator to persons entitled thereto as provided in this part and thereafter those provisions shall be applicable to such operator.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1994 801157 80113